Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. **80-34**

TOIVO HENRY IVARY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

	Page
JURISDICTION	2
STATEMENT OF THE CASE	2
QUESTION PRESENTED	5
BASIS OF JURISDICTION OF COURT OF CLAIMS	6
ARGUMENT	6
CONCLUSION	9
APPENDIX "A" - Decision of the US Court of Claims	i
APPENDIX "B" - Order Denying Re-hearing	vii

POINTS OF AUTHORITIES

CASES

Capps v. United States, 133 Ct. Cl. 811, 812, 813 .	7
Gonzales v. Freeman, 334 F_2 570	9

TABLE OF CONTENTS (Cont'd)

Page

CASES (Cont'd)

Lipp v. United States,
373 US 932 7

Pan Am-Grace Airways v. C.A.B.
342 F_2 905 9

Rutherford v. United States,
573 F_2 1224 9

Schiffman v. United States,
319 F_2 886 7

STATUTES

Title 28, United States Code,
Sec. 1255(1) 2

Title 28, United States Code,
Sec. 1491 6

Title 28, United States Code,
Sec. 2501 5,6

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Claims in favor of respondent. Attached hereto as APPENDIX "A" is the judgment of the Court of Calims dated February 8, 1980 and the Order of said Court made on March 28, 1980 denying a rehearing as APPENDIX "B".

JURISDICTION

The jurisdiction of the court is invoked under Title 28 U.S. Code Sec. 1255(1) which states as follows:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant."

STATEMENT OF THE CASE

Petitioner is a resident of the State of California. On March 5, 1942, at the age of 23 years, petitioner enlisted in the United States Marine Corps and was sent to Quantico, Virginia, for officers training. On December 16, 1942, he received his commission as a Second Lieutenant, Officers Reserve Corps. He was thereafter sent to San Diego, California, to await transfer overseas. Approximately in June, 1943, he joined the Second Marine Division in New Zealand. On November 20,

1943, petitioner participated in the invasion of Tarawa and was wounded in action. He was decorated with the Navy Cross for heroism. On November 30, 1943, he was promoted to First Lieutenant.

Petitioner, as the result of such combat action, lost his right leg four inches below the knee. After many hospitalizations, he was sent before the Review Board in San Diege in July, 1945. Said Board retired petitioner in the rank of Second Lieutenant and he received retirement pay of 75% of his base pay, although he had actually been promoted to First Lieutenant as of November 30, 1943.

In late 1949, petitioner applied to the Marine Corps for disability compensation, and on information and belief, without any medical examination or study of his previous medical records, arbitrarily assigned him a 40% disability rating based

on the amputation. No consideration was given to the shrapnel and gunshot wounds suffered by petitioner which should have increased the rating to 80%, awarded to him by the Veterans Administration.

Until approximately 1973, petitioner believed that having once elected to receive disability pay from the Veterans, he would not be eligible to receive retirement compensation under the Career Compensation Act of 1949. In 1975, he learned that this belief was wrong and he could apply for such compensation. As a consequence, he therewith filed a petition with the Board for Correction of Military Records asking that he be upgraded to the rank of First Lieutenant and that his disability rating be increased to 70%.

The said Board of Corrections determined that he was entitled to the higher rank but would not increase his disability

percentage of 40%. The aforesaid ruling was affirmed by the Secretary of the Navy on November 15, 1977.

Petitioner then filed suit in the United States Court of Claims. Respondents defended mainly on the ground that petitioner's action was not timely in that 28 U.S.C. Sec. 2501 requires that such a suit must be filed in the Court of Claims within 6 years after the claim upon which is based first accrues. The Court of Claims agreed with respondent and held that the said 6 year statute of limitations barred petitioner's claim. Petitioner had urged that the statute would not begin to run until the Secretary of the Navy had affirmed the Correction Board's decision on November 15, 1977.

QUESTION PRESENTED

The question presented is whether or not petitioner's action filed in the Court

of Claims is barred by the provisions of 28 U.S.C. Sec. 2501, which requires such a suit to be filed within 6 years after the cause of action accrues.

BASIS OF JURISDICTION OF COURT OF CLAIMS

1. The jurisdiction of the Court of Claims was invoked under Title 28, United States Code, Section 1491, and all other applicable federal laws which gives the said Court the jurisdication to review the decisions of the Military Boards of Correction.

ARGUMENT

Petitioner urges this Court that the limitation of actions set forth in Title 28, United States Code, Sec. 2501 (6 years) does not apply until the decision being attacked becomes "final". The decision does not become "final" until the approval by the Secretary of the Navy of the action

of the Correction Board. In the case herein, the Secretary gave his approval on November 15, 1977. The filing of the law suit was well within the time. See

Schiffman v. United States,
319 F_2 886

Capps v. United States,
133 Ct. Cl. 811, 812, 813

Lipp v. United States,
373 US 932

Petitioner presented two issues to the Naval Board of Corrections in 1975 which the said Board acted upon. One in his favor to upgrade his rank from Second to First Lieutenant and the second against him by the refusal to increase his disability rating. The said Board obviously had jurisdiction to act even at such a late date. To deny petitioner the right to challenge the action of the said Board would leave him without a remedy. The actions of all administrative tribunals

should be subject to Court review save those expressly protected by statute such as the Veterans Administration. The decision in petitioner's case did not become "final" until affirmed by the Secretary of the Navy.

The record will show that petitioner in his written request to the Correction Board, asked that his Veterans Administration Records be included in the review. The aforesaid documents would show the nature and extent of his gunshot and shrapnel wounds which, calculated with amputation percentage, would materially increase the disability rating.

When an agency takes action it would be inequitable not to be able to review its decision. Administrative orders are reviewable when they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative

process. See

Pan Am-Grace Airways v. C.A.B.,
342 F_2 905

Gonzales v. Freeman,
334 F_2 570

Rutherford v. United States,
573 F_2 1224

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

Dated: June 24, 1980.

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APPENDIX "A"

IN THE UNITED STATES COURT OF CLAIMS

No. 325-78

COPY

TOIVO H. IVARY	)	
	)	
	)	Military pay; retired pay (disability); limitation of actions; finality of action by board
v.	)	
	)	
	)	
	)	
THE UNITED STATES	)	FEB 8 - 1980

Toivo H. Ivary, pro se. Donald M. Sea, of counsel, for plaintiff.

Jean Schepers, with whom was Assistant Attorney General Alice Daniel, for defendant. Lt. Eric J. Taylor, JAGC, Department of the Navy, of counsel.

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

O R D E R

Plaintiff was retired from the United States Marine Corps on July 1, 1945, in the grade of second lieutenant. Due to wounds received in action, plaintiff was awarded disability payments equal to 75 percent of his base pay. In 1949 plaintiff inquired into the disability payments available through the Veterans Administration (VA). Plaintiff was examined by the VA and was rated as 80 percent disabled. (This disability rating was lowered to 70 percent in 1952.) Plaintiff chose to receive compensation from the VA, and thus, pursuant to 38 U.S.C. § 3104, which prohibits duplication of benefits from both the VA and the armed forces, plaintiff waived his right to receive military disability retirement pay.

In 1950 plaintiff was notified that he had been awarded a disability rating

of 40 percent under the Career Compensation Act of October 1, 1949, 63 Stat. 802 (current version at 10 U.S.C. § 1201 et seq.). Plaintiff objected to a 40-percent rating and submitted an application to the Physical Disability Appeal Board. The Appeal Board recommended that the 40-percent rating should be affirmed, and its recommendation was approved by the Secretary of the Navy on October 23, 1950. Plaintiff took no appeal from this decision at that time nor did he elect to receive benefits under the Act before the October 1, 1954, cutoff date. However, in 1975 plaintiff petitioned the Board for Correction of Naval Records to amend his records. The Correction Board approved a change in plaintiff's records to show that he had retired at the rank of first lieutenant but refused to raise plaintiff's disability rating. Plaintiff

filed suit in this court on July 17, 1978, praying for an increase in his disability rating, and both parties have moved for summary judgment.

We have concluded that plaintiff's suit was filed long past the expiration of the statute of limitations on such actions. 28 U.S.C. § 2501. In disability retirement cases, the claim accrues on the final action of the first board competent to pass on plaintiff's eligibility for disability retirement. Since the Correction Board here was in effect reviewing a prior final adverse determination of the Appeal Board, the Correction Board's adverse decision did not give rise to a new cause of action. Resort to the Correction Board here was a permissive remedy and did not toll the statute of limitations. Ray v. United States, 209 Ct. Cl. 761, 766 (1976);

Brownfield v. United States, 218 Ct. Cl. _____, _____, 589 F.2d 1035, 1037-38 (1978); Friedman v. United States, 159 Ct. Cl. 1, 24-25, 310 F2d 381, 395-96 (1962), cert. denied, 373 U.S. 932 (1963). Thus, plaintiff's cause of action accrued no later than October 23, 1950, when the Appeal Board's proceeding were approved by the Secretary of the Navy.

Plaintiff argues that the decision of the Appeal Board in 1950 should not be considered final because plaintiff was misled. See Friedman v. United States, supra, 159 Ct. Cl. at 24, 310 F.2d at 395-96. Plaintiff claims that he erroneously believed that his election of VA benefits in 1950 was final and precluded the receipt of any benefits under the Career Compensation Act of 1949. However, any erroneous belief on plaintiff's part was not caused by misstatements by the Government

but by plaintiff's own misreading of the 1950 letter of notification of his options under the Act. In addition, the other grounds asserted by plaintiff, such as the alleged incompleteness of the record before the Appeal Board, are not adequate circumstances here to deprive the action of the Appeal Board of finality.

Since we are required to apply the statute of limitations, we need not reach the other grounds asserted by defendant against plaintiff's claim.

IT IS THEREFORE ORDERED, upon consideration of the pleadings, motions, briefs, administrative record, and oral argument, that plaintiff's motion for summary judgment is denied, defendant's corss-motion for summary judgment is granted, and the petition is dismissed.

FEB 8 - 1980

BY THE COURT
Shiro Kashiwa
Judge, Presiding

APPENDIX "B"

IN THE UNITED STATES COURT OF CLAIMS

No. 325-78

COPY

TOIVO H. IVARY

v.

THE UNITED STATES

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed February 20, 1980, pursuant to Rule 151(b), for rehearing to alter and amend the judgment with reference to the order entered herein on February 8, 1980, dismissing plaintiff's petition. Upon consideration thereof,

together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

MAR 28 1980

Shiro Kashiwa

SHIRO KASHIWA
Judge, Presiding